

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOHN ANTHONY RUSK, JUDY RUSK,) AU:14-CV-00549-LY
v.)
NOVARTIS PHARMACEUTICALS CORPORATION, WYETH-AYERST)
LABORATORIES, INC., SANDOZ PHARMACEUTICALS CORPORATION,)
TEVA PHARMACEUTICALS USA INC., BARR LABORATORIES, INC.,)
EON LABS, INC., SANDOZ, INC.,)

MARGARET HALTON PRIEST) AU:15-CV-00822-LY
v.)
SANDOZ PHARMACEUTICALS CORPORATION, NOVARTIS)
PHARMACEUTICALS CORPORATION, SANDOZ INC.) NOVEMBER 1, 2016

TRANSCRIPT OF HEARING ON MOTION FOR CONSOLIDATION
BEFORE THE HONORABLE LEE YEAKEL

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produced by computer.

14:00:23 1 (Open Court)

14:00:23 2 THE COURT: We are here today on the motion to
14:00:30 3 consolidate Cause Number 14-CV-549, *Rusk v. Sandoz, Inc.*, with
14:00:38 4 Cause Number 15-CV-822, *Priest v. Sandoz, Inc.*

14:00:43 5 Let me get announcements by the parties, please.

14:00:49 6 MR. HOHMANN: Guy Hohmann and my cocounsel
14:00:51 7 Justin Williams on behalf of the Rusk plaintiffs and on behalf
14:00:55 8 of the Priest plaintiffs.

14:00:57 9 THE COURT: All right. And for the defendants, first
14:00:59 10 in the *Rusk* case?

14:01:01 11 MS. HADLEY: Your Honor, Elizabeth Hadley of
14:01:05 12 Greenberg Traurig and my colleague Sara Thompson from our
14:01:11 13 Atlanta Office on behalf of Sandoz in both cases.

14:01:13 14 THE COURT: All right. Thank you.

14:01:15 15 All right. Mr. Hohmann, Mr. Williams, your
14:01:18 16 motions -- I have read the motions and the responses and
14:01:24 17 anything else I've received with regard to these cases. But I
14:01:30 18 thought I would hear from you-all today instead of just ruling
14:01:35 19 on the pleadings. So let me hear from you as to why these
14:01:40 20 cases should be consolidated.

14:01:44 21 MR. HOHMANN: Would you like me to argue from the
14:01:46 22 podium, Your Honor?

14:01:47 23 THE COURT: Yes. It's helpful to an old, blind, and
14:01:50 24 deaf man from there where I can see you and you're at a
14:01:57 25 microphone.

14:01:57 1 MR. HOHMANN: Thank you, Your Honor. As the Court
14:02:00 2 noted, we're here on a motion to consolidate under Rule 42(a).
14:02:05 3 Under Rule 42(a) it's appropriate -- or if the action before
14:02:09 4 the Court involve a common question of law or fact, the Court
14:02:13 5 may do one of three things: The thing we're asking the Court
14:02:20 6 to do is consolidate the actions.

14:02:22 7 In these two cases there is one defendant, and the
14:02:25 8 common defendant in both of the cases is Sandoz. The
14:02:29 9 allegations in the case being made both by Rusk and by Priest
14:02:35 10 allege that the plaintiffs were prescribed amiodarone for an
14:02:39 11 off-label use. In addition, the plaintiffs both allege that,
14:02:44 12 after ingesting the drug, they both developed
14:02:47 13 amiodarone-induced lung disease. Thirdly, both plaintiffs
14:02:52 14 allege that they died less than a year later. Fourthly, Your
14:02:58 15 Honor, both plaintiffs allege that Sandoz marketed amiodarone
14:03:03 16 to physicians for off-label uses with knowledge of its adverse
14:03:06 17 effects. And, finally, Your Honor, both plaintiffs allege that
14:03:11 18 Sandoz failed to provide the decedents an FDA-mandated
14:03:16 19 medication guide containing a plain English description of the
14:03:20 20 dangers of the drug and its classification as a last-line
14:03:25 21 treatment.

14:03:26 22 Getting to the causes of action, Your Honor, both of
14:03:29 23 the plaintiffs allege causes of action for wrongful death,
14:03:33 24 gross negligence, off-label marketing, and negligence, per se.

14:03:38 25 And I've got three different cases -- Fifth Circuit

14:03:45 1 cases I was going to refer to. These are all cited in our
14:03:52 2 papers. The first case, Your Honor, that I wanted to pay
14:04:02 3 particular attention to is actually cited on page 4 of our
14:04:06 4 reply brief. Very similar facts. The name of that case is
14:04:11 5 *Kershaw v. Sterling Drug*. It's a Fifth Circuit 1969 case.

14:04:16 6 In that case Ms. Kershaw had taken a drug, Alaren, to
14:04:21 7 help her with a condition that was affecting her retina. She
14:04:25 8 ended up suing the manufacture, Sterling Drug, because they
14:04:29 9 hadn't provided sufficient warnings about possible side effects
14:04:33 10 of the drug.

14:04:34 11 A companion case was consolidated the day before
14:04:42 12 trial. It didn't say why, but it was the day before Kershaw
14:04:46 13 was to go to trial, it was consolidated with another companion
14:04:49 14 case. It was a verdict for the plaintiff, and on appeal the
14:04:52 15 Fifth Circuit held that consolidation was proper under those
14:04:57 16 circumstances, specifically noting the common questions of
14:05:02 17 fact: One, what caused the chloroquine retinopathy, if I'm
14:05:10 18 saying that right -- I'm sure I'm not. But what caused her eye
14:05:13 19 condition. The second common question of fact was the
14:05:15 20 defendant's knowledge of the disease. The third common
14:05:17 21 question of fact was the nature of the defendant's warnings
14:05:21 22 that were supplied with the medication.

14:05:24 23 The Fifth Circuit also held that the common questions
14:05:27 24 of law in that case were, one, the defendant's duty and, two,
14:05:31 25 the reasonableness of the warnings.

14:05:34 1 The *Kershaw* opinion also I think is instructive,
14:05:41 2 Your Honor in the sense that it specifically noted that the
14:05:44 3 trial court judge sufficiently emphasized the importance of
14:05:51 4 separating the *Kershaw* and the companion case to the jury's
14:05:53 5 consideration and their ultimate verdict. And the opinion
14:05:56 6 noted that it was apparent that the jury did just that.

14:06:00 7 Other cases, Your Honor, that are cited in our
14:06:05 8 motion, also Fifth Circuit cases, we start with -- on page 2 of
14:06:09 9 our motion, *Frazier v. Garrison Independent School District*,
14:06:14 10 Fifth Circuit 1993, and then also the *Gentry* case on page 3 of
14:06:20 11 our motion, *Gentry v. Smith*, Fifth Circuit 1973.

14:06:25 12 Those cases note that the stated purpose of
14:06:27 13 Rule 42(a) is to avoid unnecessary cost or delay and, hence,
14:06:32 14 the decision to invoke the rule is entirely within the trial
14:06:36 15 court's discretion, as it seeks to promote the administration
14:06:42 16 of justice. We also list the factors, Your Honor, that the
14:06:45 17 courts have looked to. Whether the parties would be prejudiced
14:06:50 18 is one issue and, of course, serving the interest of judicial
14:06:55 19 economy.

14:06:56 20 In this case, Your Honor, we've had something happen
14:07:00 21 that's never happened in my career, and it led to some delays
14:07:07 22 in the *Rusk* case. We've cited those in our reply. Initially
14:07:15 23 my cocounsel's wife became gravely ill and required several
14:07:22 24 hospitalizations, and that did lead to some delays. During the
14:07:27 25 May time frame, another delay, that's referenced in our -- in

14:07:32 1 our reply brief but also in our supplemental motion; that is,
14:07:37 2 we had a client during the course of this case that has
14:07:44 3 developed dementia.

14:07:47 4 Mr. Williams first met with the client in May of this
14:07:50 5 year to begin preparing her for her depositions, and he spent
14:07:54 6 three days with her in my office. He then met with her again
14:08:04 7 approximately two weeks later, again in my office, and that
14:08:08 8 time we had some of our cocounsel involved in some of these
14:08:10 9 cases. And that cocounsel who is not here today first noticed
14:08:14 10 something seemed to be a bit off.

14:08:16 11 She asked her what medication she was taking. She
14:08:21 12 replied, and that set us on a course of we need to have her
14:08:25 13 evaluated by a neurologist because she did not remember I don't
14:08:32 14 think much at all what was discussed three weeks earlier over a
14:08:36 15 three-day period -- two weeks earlier, excuse me, over a
14:08:40 16 three-day period.

14:08:41 17 There were some issues about what neurologists could
14:08:45 18 take what insurance. But, ultimately, Ms. Rusk got in to a
14:08:51 19 neurologist, and that neurologist has made a diagnosis of
14:08:58 20 dementia.

14:08:58 21 Mr. Williams and I consulted with former general
14:09:04 22 counsel to the state bar about ethical considerations. That
14:09:12 23 counsel reminded us of Rule 1.02(g) of the Texas Disciplinary
14:09:17 24 Rules of Professional Conduct, which provides that a lawyer
14:09:21 25 shall take action to secure the appointment of a guardian for a

14:09:27 1 client whenever the lawyer reasonably believes that the client
14:09:29 2 lacks legal competence and that such action should be taken to
14:09:33 3 protect the client.

14:09:35 4 We recommended that the client retain probate counsel
14:09:45 5 and a guardianship proceeding was filed I believe last Thursday
14:09:49 6 or Friday. That's in Williamson County. I'm not a probate
14:09:53 7 lawyer, but it's my understanding that those proceedings
14:09:56 8 typically take 90 to 120 days to be resolved.

14:10:03 9 Other factors, Your Honor, getting back to the
14:10:06 10 factors that the courts look to, which I believe militate in
14:10:11 11 favor of consolidation here: Do we have shared legal theories
14:10:15 12 and facts? Do the cases involve same defendant and attorneys,
14:10:19 13 such as the *Morrison v. Amway* case cited on page 4 of our
14:10:23 14 motion. Whether the cases -- another factor, whether the cases
14:10:28 15 are at similar stages of pretrial preparation -- *Mills v. Beech*
14:10:34 16 *Aircraft*, another Fifth Circuit case.

14:10:35 17 And, Your Honor, I think things -- if we look at them
14:10:41 18 prior to last Thursday, I think the cases were at different
14:10:45 19 stages of proceeding with discovery technically I think having
14:10:51 20 just recently closed in *Rusk* and discovery just commencing in
14:10:56 21 the *Priest* case. But, Your Honor, I think if we recognize that
14:11:01 22 we need 90 to 120 days to have a guardian appointed for
14:11:06 23 Ms. Rusk, then I think we're actually much closer to being on a
14:11:12 24 similar path.

14:11:14 25 Other factors, Your Honor, continuing the list:

14:11:16 1 Whether consolidation will eliminate duplicative discovery.
14:11:29 2 Certainly that would occur here, Your Honor. And then, of
14:11:32 3 course, conserving judicial resources.

14:11:34 4 I believe that, depending upon the number of
14:11:40 5 stipulations the parties could reach, we're going to be able to
14:11:43 6 eliminate several hours of testimony. And rather than having
14:11:46 7 two five-hour trials, I think we could probably get it done
14:11:49 8 with one probably six, maybe seven-hour trial, if the Court
14:11:54 9 were -- were inclined to give us a little extra time to get rid
14:11:59 10 of two cases.

14:12:00 11 Your Honor, that's all I have to add, unless the
14:12:03 12 Court has any further questions?

14:12:05 13 THE COURT: No. I don't have any questions. Let me
14:12:08 14 hear from the respondent.

14:12:10 15 MS. THOMPSON: Thank you, Your Honor. Sara Thompson.
14:12:17 16 You may remember we were here back in February in the Rusk case
14:12:21 17 for the scheduling conference. What Mr. Hohmann has just said
14:12:25 18 is certainly a possible grounds for continuance in *Rusk* -- both
14:12:28 19 Mr. Williams' wife's health conditions and also the plaintiff's
14:12:31 20 mental issues. But neither of those has anything to do with
14:12:35 21 consolidation in this case, and that's what they've moved for.
14:12:39 22 They haven't asked Your Honor for a continuance. They've asked
14:12:41 23 for consolidation, hoping that we're going to roll all of these
14:12:46 24 dates back to the *Priest* dates that are 10 months behind *Rusk*.

14:12:49 25 They just talked about 90 to 120 days. There's

14:12:51 1 certainly nothing preventing them from asking the Court for a
14:12:54 2 90- to 120-day continuing in *Rusk* of all of the remaining
14:12:59 3 deadlines and the trial date, but that's not what they've asked
14:13:01 4 for. They've asked to move these into one case that would
14:13:03 5 presumably be under the *Priest* deadlines that are 10 months
14:13:07 6 back.

14:13:07 7 Before I get into some of the other issues that they
14:13:11 8 didn't mention, we just heard about *Kershaw v. Sterling*. I
14:13:13 9 think it's really important to note in footnote 2, it notes
14:13:16 10 that there was no grounds given for the opposition to the
14:13:21 11 motion to consolidate. It was not apparent from the record.
14:13:24 12 Obviously we're in a different situation here. We've argued
14:13:26 13 prejudice to Sandoz, and we've also argued the reasons why we
14:13:29 14 don't believe that this fits the consolidation factors more
14:13:32 15 recently than *Kershaw* outlined by the Fifth Circuit. So I
14:13:36 16 think that's one big distinction there.

14:13:39 17 And we heard about eliminating duplicative discovery,
14:13:42 18 and that's just simply not true. We're going to have different
14:13:43 19 documents. We're going to have different witnesses both
14:13:45 20 because these drugs were dispensed and manufactured at
14:13:48 21 different times, and so the policies changed over time. The
14:13:52 22 version of the labeling in place changes over time. The
14:13:55 23 version of the medication guide changes over time. So we're
14:13:58 24 going to have somewhat different documents. And that ignores
14:14:01 25 all of the factual differences between the two patients.

14:14:04 1 But they also ignored, Your Honor, the real reason
14:14:07 2 that they're requesting this, and that's because they haven't
14:14:10 3 served any expert reports or disclosures in *Rusk* and the
14:14:14 4 deadline passed September 15th. They never asked for an
14:14:17 5 extension of that deadline. They never came to the Court and
14:14:20 6 said we need this additional time due to either Ms. Rusk's
14:14:24 7 incapacity or due to the issues with Mr. Williams' wife's
14:14:28 8 health.

14:14:28 9 And we have -- we went back and looked at these
14:14:31 10 today. We first learned of Ms. Rusk's mental issues and why
14:14:35 11 she maybe wasn't going to be able to give a deposition back in
14:14:37 12 July. But we filed a motion to compel that was granted by the
14:14:40 13 magistrate that included her deposition. And the rules for
14:14:45 14 when somebody is incapacitated and unable to testify aren't
14:14:49 15 just that you get a letter from a doctor that says she has mild
14:14:52 16 dementia, which is what they filed with the Court on Friday.
14:14:56 17 There's a showing that needs to be made, and I don't think
14:14:59 18 they've even met that.

14:15:00 19 And without her testimony, based on the fact that
14:15:02 20 we've deposed everyone else in the case -- all of the treating
14:15:04 21 physician, the prescribing physicians, Mr. Rusk's two children
14:15:08 22 and his stepdaughter who they now want to have appointed as the
14:15:11 23 guardian -- none of them have knowledge of whether or not
14:15:14 24 Mr. Rusk received a medication guide. They're not going to
14:15:17 25 have anyone who is going to be able to testify that he

14:15:20 1 definitively did not receive a medication guide. All they have
14:15:24 2 is their complaint, and it's not evidence.

14:15:25 3 And so we have a motion for summary judgment that
14:15:27 4 we're ready to file two weeks from today, Your Honor, that is
14:15:30 5 going to lay out we have completed fact discovery in *Rusk*. We
14:15:34 6 have taken the depositions of all of these treating physicians.
14:15:37 7 We've disclosed our experts. We put our cards on the table.
14:15:40 8 We said this is what our experts are going to say. Based on
14:15:43 9 all of the discovery completed to date, the 25,000 pages of
14:15:47 10 documents we've produced that include batch records that show
14:15:50 11 every single shipment of amiodarone that could have been the
14:15:54 12 ones Mr. Rusk's three doses came from were shipped with
14:15:57 13 medication guides. There's documentation of that. An employee
14:16:00 14 has actually reviewed all of that and completed an affidavit.

14:16:04 15 We've met our burden even though we're not the ones
14:16:07 16 who have the burden, and we've put our expert reports out
14:16:10 17 there. They haven't served anything. At a deposition on
14:16:13 18 October 6th, Mr. Williams said that they planned to rely on
14:16:16 19 treating physicians, but they've never served a disclosure of
14:16:20 20 which treating physicians, what opinions, where we can find
14:16:23 21 them in the medical records, nothing. They've never served
14:16:26 22 anything on experts in this case.

14:16:27 23 And so *Rusk* is ready to go. It's teed up for a
14:16:31 24 motion for summary judgment that we think is going to be very
14:16:33 25 compelling. And the reason that Plaintiffs are filing this

14:16:36 1 motion to consolidate is because they need more time, and they
14:16:38 2 know that if they come to Your Honor and they say they'd like a
14:16:41 3 continuance, Your Honor has been very clear at both scheduling
14:16:44 4 conferences that you don't really like continuances. So it
14:16:47 5 probably would be denied, so they think this is maybe a more
14:16:49 6 effective strategy. But the factors that they just mentioned
14:16:52 7 counsel for a continuance and not for consolidation.

14:16:56 8 And the cases that we cited in our opposition -- and
14:16:58 9 I'm happy to provide copies of any of them for Your Honor.
14:17:01 10 Some of them are the same ones that they just handed up -- talk
14:17:04 11 about prejudice as being a primary concern when it comes to
14:17:07 12 whether or not to consolidate. You have to worry about whether
14:17:11 13 or not it's going to confuse the jury.

14:17:12 14 We have one patient who took amiodarone from 2006 off
14:17:17 15 and on until his death in 2012. We have another patient who
14:17:21 16 didn't take amiodarone until July 2013 and only took it for a
14:17:24 17 few months. The facts are very different. And, Your Honor, I
14:17:28 18 have here -- and I'm happy to provide a copy to the Court and a
14:17:31 19 copy to the counsel -- three pages that just lay out and charts
14:17:34 20 the differences in dates and the differences -- the differences
14:17:40 21 in facts between the two cases.

14:17:42 22 On the first page we have the different dates of when
14:17:46 23 things were filed, what the deadlines are. The ones in green
14:17:49 24 on that first page are dates that have already passed. They're
14:17:53 25 deadlines that either have or have not been met. And Sandoz

14:17:56 1 believes that it's produced everything it was required to, has
14:17:58 2 fully complied with discovery, and it's ready to file its MSJ
14:18:03 3 in *Rusk*. Those dates aren't even coming up in *Priest* until
14:18:06 4 late next year. So we're at two very different stages, not
14:18:10 5 just 90 to 120 days, ten months of difference.

14:18:12 6 Then on the next slide we have a summary of the
14:18:14 7 discovery that's been completed in the two cases. Under the
14:18:17 8 depositions, the ones in green are ones that we took. The one
14:18:20 9 in red is the one that the plaintiffs subpoenaed. Those are
14:18:22 10 treating physicians, family members, and a pharmacy manager.
14:18:27 11 Those depositions are done.

14:18:28 12 We have document production. Sandoz produced over
14:18:30 13 25,000 pages in *Rusk*. Plaintiffs produced over 12,000 pages,
14:18:34 14 most of which are medical records, but they've made a
14:18:37 15 significant production. We just received last night and we've
14:18:40 16 been going through it this morning the first production of
14:18:42 17 documents in *Priest*. We just received the first records
14:18:45 18 showing prescriptions, three of which were -- were filled. And
14:18:48 19 that's on -- sorry -- two of which were filled on the third
14:18:52 20 page in *Priest* with Sandoz product.

14:18:55 21 Before that we had a complaint that at different
14:18:57 22 dates at a different dosage and had an NDC code that didn't
14:19:00 23 resolve to a Sandoz number. It resolved to a different
14:19:03 24 manufacturer. So we've just gotten that. We're just starting
14:19:06 25 discovery in *Priest*, and in *Rusk* it's almost done.

14:19:09 1 And we have totally different time lines here. We
14:19:11 2 have a different date of death, we have different physicians,
14:19:14 3 we have different pharmacies -- not even the same chain. And
14:19:17 4 the thing that's complicated about this it's not like Sandoz
14:19:20 5 just manufactures this drug and ships it to individual
14:19:24 6 pharmacies to dispense to patients. That may be what Plaintiff
14:19:27 7 believes, but that's not the case.

14:19:28 8 There's one of two things that always happen. It
14:19:30 9 either goes to a distributor, like McKesson, who then sells it
14:19:34 10 and ships it to pharmacies. Or in the case of a big pharmacy
14:19:38 11 chain, it goes to a main distribution center who then doles it
14:19:41 12 out and ships it. And so there's a lot of places along the way
14:19:44 13 after it left Sandoz that medication guides may be separated
14:19:47 14 from the drug. But Sandoz has met its obligations, and we've
14:19:51 15 produced documents in *Rusk* to show that we met our obligation
14:19:55 16 to ship it with the medication guides.

14:19:56 17 And we're ready to go. There's no evidence, there's
14:19:58 18 no expert, there's no witness for Plaintiffs in *Rusk* who is
14:20:01 19 going to be able to say that he did not get medication guides.
14:20:05 20 We've asked the question of the family members. We've asked
14:20:08 21 the questions of the pharmacist that they deposed last week.

14:20:11 22 So we're in two different postures, and one of the
14:20:15 23 concerns for consolidation is whether or not it will lengthen
14:20:18 24 the time to resolution or shorten. For *Rusk* there's no
14:20:22 25 question it will lengthen it. We're ready to file a motion in

14:20:26 1 two weeks. If they get what they're asking for, they're
14:20:28 2 pushing all of the dates back 10 months. So that's definitely
14:20:31 3 going to lengthen it. And that will necessarily increase the
14:20:34 4 burden and expense, which is another factor because we're going
14:20:37 5 to then presumably have them ask to reopen discovery and take
14:20:41 6 additional depositions and receive additional documents that
14:20:44 7 otherwise wouldn't be permitted in *Rusk* because discovery is
14:20:49 8 over. They also presumably would want to get experts in *Rusk*
14:20:51 9 that they have not disclosed to this point which would be a
14:20:53 10 significant prejudice to us because they missed their deadline
14:20:56 11 and we have a strong motion on that basis.

14:20:59 12 So all of these factors counsel against
14:21:03 13 consolidation. The only similarities are it's the same drug,
14:21:05 14 same defendant, and the same counsel. But the other thing is
14:21:08 15 that this is a very factually intensive inquiry in each case.
14:21:13 16 We're going to have two different stories on what was the
14:21:16 17 patient's condition prior to starting amiodarone. What was
14:21:19 18 their course after they started amiodarone? What did their
14:21:22 19 physicians who prescribed it know about the risks and what did
14:21:25 20 they tell them about their risks? What were the signs and
14:21:29 21 symptoms they developed of amiodarone issues? Were there chest
14:21:35 22 x-rays that were interpreted? Were there tests that were done?
14:21:37 23 How did they respond to medication and other treatment once
14:21:40 24 they developed their lung conditions? What caused their death?

14:21:42 25 The expert opinions on these are going to be

14:21:45 1 different. These are all going to be factually dependent and
14:21:49 2 different, and that counsels against consolidation. On a broad
14:21:52 3 level, yes, they're very similar, but they're not the same, not
14:21:55 4 even close to the same.

14:21:56 5 And the experts that we have worked with on the
14:21:58 6 reports that we've produced did a very deep dive on the medical
14:22:02 7 records that we have and looked at whether or not each chest
14:22:05 8 x-ray film supports a diagnosis of amiodarone-induced pulmonary
14:22:11 9 toxicity, whether or not the patient's response to steroids is
14:22:14 10 consistent with it, whether or not other medical conditions and
14:22:18 11 complications caused their death. These are factually
14:22:21 12 specific.

14:22:22 13 What they also didn't mention is, after we were here
14:22:22 14 in February in *Rusk* and we set a trial date, the plaintiffs
14:22:24 15 moved for consolidation of all of the federal court cases
14:22:27 16 involving amiodarone from all manufacturers into a
14:22:30 17 multidistrict litigation. And the analysis is the same, it's
14:22:33 18 not the same, as a motion to consolidate. But the JPML
14:22:38 19 actually denied consolidation, finding that the factual
14:22:41 20 differences between the cases counseled against consolidation.
14:22:45 21 It's the same issue here.

14:22:46 22 And they didn't serve their first discovery in *Rusk*
14:22:49 23 on us until the end of June. We served discovery and we served
14:22:54 24 a request for Ms. Rusk's deposition on June 1st, but there was
14:22:56 25 nothing happening in this case until the end of June.

14:22:59 1 So this crisis of not completing discovery, of not
14:23:02 2 having experts, whatever it is that caused them to feel like
14:23:05 3 this was their only option is entirely of Plaintiff's own
14:23:09 4 making. We've complied with our obligations at great effort
14:23:12 5 and expense. Let me just tell you September was a very busy
14:23:15 6 month in our firm because of having to get everything done
14:23:17 7 before the deadline, but we did it and we're ready. And it
14:23:20 8 would prejudice us if all of that was for not.

14:23:23 9 So unless Your Honor has any questions?

14:23:27 10 MR. WILLIAMS: May I respond, Judge?

14:23:29 11 THE COURT: You may.

14:23:35 12 MR. WILLIAMS: Your Honor, this is Justin Williams on
14:23:38 13 the behalf of the Priest plaintiffs, and this is not going to
14:23:41 14 be the easiest response I've ever made in my life. It's
14:23:45 15 probably going to be one of the most difficult.

14:23:50 16 I'm going to start off by giving you a little
14:23:53 17 background of what's happened in *Rusk*. In May, as Mr. Hohmann
14:23:58 18 indicated, we had a request from Sandoz for the deposition of
14:24:01 19 Judy Rusk, the widow. I met with her -- Ms. Rusk for three
14:24:06 20 days to produce Ms. Rusk for deposition. And as far as I could
14:24:11 21 tell, she went from being a person who'd never been deposed
14:24:14 22 before to somebody who could answer counsel's questions. And I
14:24:19 23 called them up and told them I would be willing to produce her
14:24:21 24 before the end of May.

14:24:22 25 We went to the motion to join all these cases in

14:24:32 1 Chicago. And I was called by my daughter who told me my wife
14:24:35 2 had been hospitalized, and she got very ill and almost died
14:24:38 3 twice over the 12 weeks. It was a very difficult time,
14:24:51 4 probably the most difficult time I've had as a lawyer because
14:24:55 5 it involved my wife who had stood beside me in a lot of
14:24:58 6 different difficulties, including a cancer battle.

14:25:02 7 During that time I took three days off to come and
14:25:05 8 visit with Judy Rusk in the attempt to have her deposed again.
14:25:09 9 And during that time it became clear that she had not
14:25:12 10 understood or remembered what I had talked to her about three
14:25:15 11 days later -- three days -- two weeks before.

14:25:16 12 At that time when I went back, my wife had gotten out
14:25:23 13 of the hospital and the three days I was gone she became
14:25:26 14 dehydrated and was re-hospitalized with blood pressure of 72
14:25:31 15 over 48 and they couldn't get a pulse. She almost died again.
14:25:36 16 I was out of commission, basically, until mid-July and we
14:25:40 17 didn't do the things I would normally do in a case.

14:25:43 18 However, after that time we started sending
14:25:46 19 discovery, and I spent an inordinate amount of time -- the
14:25:51 20 reason Sandoz is ready for trial in this case -- I spent 25
14:25:55 21 years as a defense lawyer, and I wouldn't be sitting in the
14:25:58 22 chairs saying the things they're saying because the reason
14:26:02 23 they're ready is because I spent an inordinate amount of time
14:26:05 24 attempting to attend depositions and making sure that they were
14:26:09 25 ready for trial and giving them every deposition they wanted.

14:26:13 1 Prior to the discovery -- the deadline for experts,
14:26:18 2 we had a choice. We didn't have all the documents. We weren't
14:26:21 3 ready for our experts. We could file for a consolidation or a
14:26:25 4 continuance, and we were offered a continuance or we were
14:26:28 5 offered something by Sandoz that we didn't feel was in the best
14:26:32 6 interests of our client. Mr. Hohmann and I got an ethics
14:26:35 7 opinion and we looked at the rules, and we were told we needed
14:26:38 8 to get a guardianship.

14:26:40 9 They talk about there was a motion to compel filed in
14:26:44 10 July, and they asked for Judy Rusk's deposition. And we didn't
14:26:48 11 oppose that. The reason is she hadn't been to the doctor at
14:26:51 12 that time. I didn't have anything other than my -- I told them
14:26:55 13 I didn't think she could be deposed, but I had nothing that I
14:26:58 14 could actually say to the Court. And I intended to try to
14:27:01 15 depose -- have her deposed, and then she went to the
14:27:05 16 neurologist and I was told that, first, she couldn't be relied
14:27:09 17 on which gave me pause as to what my ethical duties as a lawyer
14:27:13 18 were, and she hadn't been told about her condition by family
14:27:18 19 members.

14:27:18 20 I couldn't, according to the ethics lawyer, produce
14:27:22 21 her for deposition and have the opposition over here start
14:27:25 22 questioning her about her condition and about the different
14:27:28 23 things and her not be able to protect herself as a witness nor
14:27:33 24 even understand her condition.

14:27:35 25 Her family finally had the doctor -- the family and

14:27:39 1 the doctor finally sat down several weeks ago. The doctor sent
14:27:43 2 the letters to me. And tomorrow we'll file a motion to reopen
14:27:49 3 the motion to compel, telling the Court that we are of the
14:27:53 4 opinion we can't produce Ms. Rusk. We didn't have anything to
14:27:58 5 say at the original time of the motion to compel. We have -- I
14:28:03 6 mean, we couldn't -- what I could say was, as a lawyer, I don't
14:28:07 7 think she's capable of being a witness, but that's not really
14:28:12 8 any evidence for the Court to consider. And I didn't have
14:28:15 9 anything from a doctor that said I couldn't produce her, so I
14:28:19 10 was attending -- intending to produce her until the time I was
14:28:22 11 given medical instructions I can't.

14:28:28 12 If the Judge rules -- if you rule against our
14:28:31 13 consolidation, which we -- the reason we filed a consolidation
14:28:35 14 instead of a continuance when we saw we were going to have
14:28:38 15 trouble with the deadlines because of my situation and Ms. Rusk
14:28:41 16 is because, if we file a continuance, Judge, we're going to get
14:28:45 17 off the docket. We'll be -- I don't know when we'll be able to
14:28:48 18 get a trial date again, but it will be certainly after the
14:28:52 19 *Rusk* -- the *Priest* trial date.

14:28:55 20 THE COURT: Well, let me stop you right there. What
14:28:57 21 makes you think it will be after the *Priest* trial date?

14:29:01 22 MR. WILLIAMS: Well, just from understanding what you
14:29:03 23 had told us about your docket at the time of the initial
14:29:06 24 scheduling conference, we thought -- I was of the opinion, at
14:29:10 25 least maybe mistaken, that we would be -- if we did that, if we

14:29:14 1 filed a continuance, we would be set further back than *Priest*.
14:29:19 2 And my problem with that was, the further we got set back, the
14:29:24 3 more my client would not understand anything that happened.

14:29:27 4 The reason she filed this case was because of her
14:29:30 5 husband, and I wanted her to have the benefit of whatever
14:29:33 6 happened in this case. I thought I owed that to her as her
14:29:36 7 lawyer. So I filed a consolidation instead of a continuance
14:29:40 8 to -- in order to try to -- I thought it was the best way that
14:29:44 9 we could -- that we would get our deadlines moved, that we
14:29:48 10 could get her the guardianship, and do -- fulfill our ethical
14:29:53 11 obligations to her.

14:29:54 12 And also, Judge, frankly, you know, they -- I'm
14:29:57 13 responding to this because that's what they say is our real
14:30:01 14 reason. Certainly it plays a part. But we also think that,
14:30:06 15 unlike what they're saying about the differences, the
14:30:09 16 difference in medical causation in this case is going to be
14:30:13 17 very few witnesses. This is an issue -- and I didn't intend to
14:30:18 18 argue a summary judgment that hasn't been filed, but we think
14:30:21 19 that --

14:30:22 20 THE COURT: Well, then don't argue a summary
14:30:24 21 judgment.

14:30:25 22 MR. WILLIAMS: Okay. Well, I was going to respond to
14:30:27 23 counsel, but I won't argue it then.

14:30:28 24 THE COURT: Well, I obviously am not going to
14:30:31 25 consider it because I haven't read the motion. So, therefore,

14:30:33 1 I wouldn't consider the response either because I hadn't read
14:30:36 2 the motion.

14:30:36 3 MR. WILLIAMS: Yeah. I understand that, Judge. I
14:30:38 4 just -- you know, sometimes as a lawyer you fill like when
14:30:41 5 somebody says something, that it's your -- that you have some
14:30:46 6 obligation.

14:30:46 7 THE COURT: Well, when a lawyer flips a lure out on
14:30:49 8 the water, you don't have to swim up and grab it.

14:30:53 9 MR. WILLIAMS: All right. Well, that's good advice
14:30:55 10 for not only fishing, but for lawyering.

14:30:58 11 As far as the issues in consolidation, as Mr. Hohmann
14:31:04 12 has pointed out, and in response to the issue that we're here
14:31:07 13 today, this is a case on causation based on whether or not
14:31:13 14 adequacy of warning was done -- was the warnings given by
14:31:18 15 Sandoz, did they comply with the FDA requirements? is what we
14:31:23 16 believe is the standard for adequacy of warning. And we don't
14:31:27 17 think in either case that occurred, so we think they're similar
14:31:30 18 and we think that the ultimate issue in this case is exactly
14:31:35 19 the same for *Priest* and *Rusk*. And how they fulfill that duty,
14:31:40 20 that's the ultimate question that's going to a jury. And
14:31:43 21 that's the same question in both cases, so I think
14:31:46 22 consolidation is totally appropriate for that.

14:31:49 23 If there is no questions about any of it, Your Honor,
14:31:53 24 I will stop and not -- and try to get -- dislodge the lure from
14:31:58 25 my mouth and sit down.

14:32:00 1 THE COURT: All right. You may. All right. You may
14:32:03 2 sit down.

14:32:04 3 MR. WILLIAMS: Thank you.

14:32:05 4 THE COURT: All right. I've got a lot of -- a lot of
14:32:08 5 things in these two cases. There's been a lot of water under
14:32:12 6 the bridge in both of them.

14:32:14 7 The *Rusk* case is currently set for jury trial in
14:32:17 8 April of 2017, and the *Priest* case is set for jury trial in
14:32:22 9 February of 2018. They are on separate paths to completion.
14:32:32 10 And the fact that there may be a delay in *Rusk* over the
14:32:38 11 guardianship isn't going to chew up a year between April -- or
14:32:47 12 10 months between April of 2017 and February of 2018.

14:32:53 13 I am, granted, great discretion under Rule 42(a) to
14:32:59 14 determine whether to consolidate a case or not to consolidate a
14:33:03 15 case. There is a problem in cases like this with consolidating
14:33:10 16 them in that we do have two deaths. The deaths allegedly are
14:33:17 17 linked to the Sandoz drug. But we have drugs that were
14:33:23 18 manufactured at different times in different batches. We have
14:33:28 19 and will have different testimony as to what the plaintiffs did
14:33:38 20 and did not do.

14:33:39 21 Those issues may to a large degree resolve themselves
14:33:48 22 as we proceed forward. It is possible that the court may grant
14:33:54 23 partial summary judgment if filed in one or both cases
14:33:56 24 involving certain issues in the case and not grant a complete
14:34:00 25 summary judgment. That type of determining issues, if they are

14:34:10 1 not disputed, then could lead to simpler ways to try the case
14:34:18 2 on -- the cases on damages.

14:34:19 3 I have found that it does not assist the concept that
14:34:24 4 people have of judicial economy to deal what the straight-up
14:34:34 5 obviousness in cases. Number one, I don't believe there is
14:34:37 6 such a concept as judicial economy, at least not the Austin
14:34:42 7 Division of the Western District of Texas. We have large
14:34:45 8 dockets here. I'm going to come out and sit on the bench. I
14:34:48 9 can try two cases or I can try one case. If it's a difference
14:34:54 10 between a few hours, that's not a big problem for me.

14:35:01 11 I do think these cases are different. I do think
14:35:04 12 they are on different time lines. I do think the *Rusk* case is
14:35:07 13 on a faster track right now. I do note that I think it is
14:35:11 14 November the 15th that dispositive motions are due?

14:35:16 15 MS. THOMPSON: Yes, sir.

14:35:16 16 THE COURT: I have heard a lot here today, and I do
14:35:24 17 not give any consideration to what one side or the other says
14:35:27 18 the other side's motivations are. I just find that these cases
14:35:36 19 a not good candidates for consolidation. And for those reasons
14:35:40 20 I'm going to exercise my discretion, and I will deny the
14:35:44 21 motions to consolidate the two cases.

14:35:50 22 That having been said, that does not judge any of the
14:35:53 23 issues that I have heard here today. There may be other paths
14:36:04 24 or means that either the plaintiffs or the defendants care to
14:36:07 25 take from this point forward. I'm not going to presume what

14:36:13 1 the outcome of the guardianship would be or who might be a
14:36:17 2 substituted party in the *Rusk* case. I'm going to have to take
14:36:23 3 that up as it comes along.

14:36:25 4 I do urge the parties whenever there is anything that
14:36:31 5 happens outside of my presence in one of these two cases that
14:36:36 6 is significant, that you either get me a motion because you
14:36:39 7 think it changes the calculus or at least get me a status
14:36:43 8 report. I urge all of you, because you're good professional
14:36:48 9 lawyers, from this point forward not to try to out-plead one
14:36:55 10 another but to be in contact on what ought to be done in this
14:36:58 11 case.

14:36:59 12 For instance, I'm going to have to have something
14:37:03 13 definite in front of me regarding whether or not Judith Rusk --
14:37:13 14 that's who we're talking about, isn't it? -- is still a party
14:37:17 15 to this case. I am not prone to proceed forward without having
14:37:21 16 a party or party representative, but I don't have anything in
14:37:24 17 the record right now other than what was mentioned that lets me
14:37:28 18 know that she might not be an appropriate party in this case at
14:37:31 19 this point. These are things that need to be presented to me.

14:37:35 20 I mentioned the fact that, if I granted a
14:37:39 21 continuance, the case wouldn't necessarily be put off until
14:37:44 22 February 2018. You-all did appear at the initial pretrial
14:37:50 23 conference, and you heard what I had to say about my docket.
14:37:53 24 But let me tell you what exists with a large docket. It's a
14:37:59 25 big docket, it's an imposing docket. I use the analogy, if

14:38:05 1 there's big block of cheese blocking your path, the cheese of
14:38:09 2 my docket is Swiss cheese, it's not cheddar cheese. It's big
14:38:14 3 and looks like you can't penetrate it, but there are various
14:38:19 4 little holes working their way and paths working their way
14:38:22 5 through it. And there are more of those created every day
14:38:27 6 because cases get settled -- cases get settled off my docket.

14:38:34 7 So when I tell you that I have a large docket, it's
14:38:37 8 true. But at any given moment it is also possible that I could
14:38:41 9 look at my calendar and tell you I could put you to trial next
14:38:45 10 week. And I say that right now because I could tell you that
14:38:48 11 right now because I was set to start a two-week patent trial on
14:38:53 12 Monday that I had blocked everything out for and it settled
14:38:57 13 last Friday. So now I have a gap when I can do other things.

14:39:02 14 Now, that scenario plays out down the line. Sometimes I don't
14:39:08 15 get breaks, but often I do.

14:39:10 16 So if this case, the *Rusk* case, for whatever reason
14:39:16 17 were not to be tried in April of 2017 and it did survive
14:39:21 18 dispositive motions, I'm not -- I don't like to grant
14:39:29 19 continuances, but there is no reason to believe that, if I did
14:39:34 20 because we had to work out this party problem, that you would
14:39:39 21 get put off very long just because of the constant moving
14:39:44 22 around on my docket.

14:39:45 23 I know that some judges you appear in front of might
14:39:49 24 tell you that I'm now setting cases -- that that judge is
14:39:52 25 setting cases in late 2017 or early 2018, and that's the

14:39:58 1 earliest they're setting them. I set my cases just the way
14:40:00 2 this came about with you-all. We sit down at an initial
14:40:03 3 pretrial conference, we look at your proposed scheduling order,
14:40:07 4 how long you think it will take to get discovery out of the
14:40:10 5 way, expert information out of the way, how long it will take
14:40:18 6 you to file dispositive motions, and then we look and see what
14:40:21 7 trial date we have. In some instances that trial date is
14:40:25 8 fairly far off, depending on what the lawyers tell me they need
14:40:28 9 to do in a case. In other cases -- in fact, in many cases --
14:40:32 10 we go to trial in under a year from the initial pretrial
14:40:36 11 conference. I fashion my docket as best I can based on what
14:40:42 12 the lawyers need.

14:40:43 13 So by denying the motion to consolidate, it doesn't
14:40:47 14 mean that any of the issues that were brought up by either --
14:40:52 15 or any party in this case are not still before the court, and
14:40:56 16 it may be that I need to deal with them on different types of
14:41:00 17 motions other than a motion to consolidate. That does not mean
14:41:06 18 I agree that the motion to consolidate was indeed a
14:41:09 19 substitution for a motion for continuance. I think they
14:41:13 20 involve two different things and two different matters.

14:41:17 21 What I do want you to do now that I've made this
14:41:19 22 ruling is to be in contact with one another. Particularly I
14:41:25 23 want the plaintiff lawyers in the *Rusk* case to make sure that
14:41:31 24 the defendants know what the proceeding and scheduling is in
14:41:37 25 the Williamson County guardianship at all times. I want you to

14:41:41 1 get to me something formal about that guardianship and keep me
14:41:45 2 advised as to what's going on. I'm not going to interrupt the
14:41:49 3 scheduling order as it exists right now for that because I want
14:41:55 4 to go ahead in the *Rusk* case and get in dispositive motions.

14:41:59 5 But the plaintiffs need to understand, if they need
14:42:04 6 to file something else, they need to file something else. So
14:42:08 7 that's where we are. I think we can proceed right now with
14:42:18 8 *Rusk*, but I'm willing to change my mind if I get other
14:42:23 9 information before me. I think that -- that, as I said, this
14:42:32 10 being the type of case it is, that the ones I've seen don't
14:42:39 11 lend themselves particularly well to consolidation even though
14:42:47 12 I can consolidate. In spite of what the Multidistrict
14:42:52 13 Litigation Panel did, I think the MDL panel had a lot of
14:42:56 14 information about a lot of these cases and, for many of the
14:43:02 15 same reasons the MDL panel had in not combining them all around
14:43:05 16 the country, I'm not going to combine two of them in my court.

14:43:09 17 So the motion to consolidate is denied. It is denied
14:43:14 18 without prejudice to the plaintiffs bringing up any of the
14:43:22 19 topics or issues that were expressed in the motion to
14:43:24 20 consolidate or were expressed in argument here today by means
14:43:31 21 of some other motion. It is the ruling of this court that the
14:43:35 22 ruling on the motion to consolidate has no issue preclusion
14:43:48 23 result other than that I'm not going to consolidate the cases.

14:43:51 24 Now, while I have you in front of me and you-all are
14:43:55 25 here, is there anything else that any party wants to bring up

14:44:00 1 with regard to either of the cases or anything else we should
14:44:06 2 do at this time? I'll start with the plaintiffs. Do you have
14:44:10 3 anything further?

14:44:11 4 MR. HOHMANN: Your Honor, just a point of
14:44:13 5 clarification. I want to make sure that -- the Court has
14:44:17 6 obviously taken it into account in its ruling, but I just
14:44:20 7 wanted to make sure the Court was aware of Document Number 115.
14:44:24 8 It was a supplement to our motion to consolidate the actions.
14:44:29 9 It contained a copy of the actual petition for guardianship, if
14:44:32 10 that's what they call it. We will certainly keep the Court
14:44:38 11 aware -- opposing counsel as well -- of the status of those
14:44:42 12 proceedings.

14:44:42 13 THE COURT: And anything further from the defendants?

14:44:44 14 MS. THOMPSON: No, Your Honor.

14:44:45 15 THE COURT: All right. At this time thank you-all,
14:44:47 16 and the court is in recess.

0:0:0 17 (End of transcript)

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1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
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